United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2116

To be argued by
Richard R. Rowley.

UNITED STATES COURT OF APPEALS

For the Second Circuit.

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EDWARD L. KIRKLAND and NATHANIEL HAYES, each individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

against

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES; RUSSELL OSWALD, individually and in his capacity as Commissioner of the New York State Department of Correctional Services; THE NEW YORK STATE CIVIL SERVICE COMMISSION; ERSA POSTON, individually and in her capacity as President of the New York State Civil Service Commission and Civil Service Commissioner; MICHAEL N. SCELSI and CHARLES F. STOCKMEISTER, each individually and in his capacity as Civil Service Commissioner,

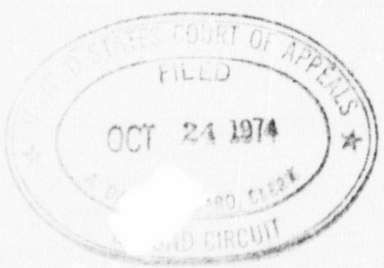
Defendants-Appellants,

and

ALBERT M. RIBEIRO and HENRY L. COONS,

Intervenors-Appellants.

BRIEF FOR INTERVENORS-APPELLANTS



SNEERINGER & ROWLEY P.C.
Attorneys for Intervenors-Appellants
90 State Street
Albany, New York 12207
Telephone: (518) 434-6187

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ALBERT M. RIBEIRO and HENRY L. COONS,

Intervenors-Appellants.

BRIEF FOR INTERVENORS-APPELLANTS

Statement

Intervenors-appellants (herein Ribeiro) appeal from the judgment and order of the United States District Court for the Southern District of New York rendered after a trial

without a jury before Hon. Morris E. Lasker, District Judge, granting judgment to the plaintiffs adjudging New York State Civil Service Examination 34-944 for the position of Correction Sergeant to be invalid as violating the Constitution of the United States. The order of the District Court enjoined the State of New York and named State officials from making any permanent or provisional appointments to the position of Correction Sergeant based upon the eligible list promulgated as a result of said examination, directed the said defendants to develop a lawful, nondiscriminatory selection procedure pursuant to specified guidelines, permitted interim provisional appointments to be made only upon application to the Court and pursuant to a quota whereby at least one of every four promotions pursuant to the interim procedures shall be from members of the minority groups involved and continued such quota system following the development of a revised selection procedure until the combined percentage of blacks and hispanics in the ranks of Correction Sergeant equaled the percentage thereof in the ranks of Correction Officers. The District Court retained jurisdiction of the proceeding for such period as might be necessary to supervise the decree and further proceedings thereunder and to determine the reasonable value of the plaintiffs' attorneys' services.

ISSUES

1. Did the failure to join indispensable parties potentially deprive such parties of their property rights without due process of law so as to require a dismissal of the complaint?

2. Should the District Court have allowed appointments from the eligible list promulgated from Examination 34-944 and made prior to the entry of the decree to become permanent?

3. Was the District Court correct in directing the use of a one to three preferential appointment ratio in both interim and final appointment procedures?

FACTS

All numbers in parenthesis refer to pages of the Appendix or refer to exhibits of the parties and their page numbers in the Appendix.

The facts which are relevant to this brief are very simple. The position of Correction Sergeant is a promotional position in the New York State Department of Correction. The entry position is the job of Correction Officer commonly referred to in former times as a Prison Guard. Today there are many variations of the position of Correction Officer serving in many State institutions

in addition to the traditional maximum security facilities. A Correction Sergeant is essentially the first line supervisor above a Correction Officer. Both of the positions, that is Correction Officer and Correction Sergeant, are in the classified service of the New York State Civil Service as defined by Section 40 of the Civil Service Law and both of the positions are in the competitive class within the meaning of Section 44 of the Civil Service Law of the State of New York.

Under Section 6, Article V of the New York State Constitution such positions must be filled according to merit and fitness ascertained by competitive examination so far as practicable.

Section 52 of the Civil Service Law of the State of New York describes in considerable detail the procedures for conducting promotion examinations and provides in part that as far as practicable vacancies in positions in the competitive class shall be filled by promotion from among persons holding competitive class positions in a lower grade. After a Civil Service examination has been administered an eligible list is established among the applicants having passed the test including appropriate credit for service in the Armed Forces and similar

credits provided by law. Under Section 56 of the Civil Service Law the duration of an eligible list shall be not less than one nor more than four years and a list that has been in existence for one or more years shall terminate upon the establishment of an appropriate new list unless otherwise prescribed.

Appointments from an eligible list are made on the basis of any one of the top three persons pursuant to Section 61 of the Civil Service Law and persons appointed from an eligible list are appointed to a probationary term unless probation is waived by the appointing officer.

Under Section 65 of the Civil Service Law whenever there is no appropriate eligible list a person may be appointed provisionally to fill such vacancy until an appointment can be made after competitive examaination. Provisional appointments can not continue for more than nine months except where a competitive examination following the provisional appointment fails to produce an adequate list or it is immediately exhausted in which case a new provisional appointment can be made. Under Section 52 (10) of the Civil Service Law provisional service can not be credited in a promotional examination although once an applicant has qualified by competitive examination for a

position his provisional service shall be credited in his permanent position.

A probationary appointee, whether in the entry grade or in a promotional grade immediately upon appointment obtains significant Civil Service rights. Under the Rules and Regulations of the New York State Civil Service Commission, 4 N.Y.C.R.R. 4.5, a probationary appointment is for a specific period of time during which the employee can not be dismissed except upon charges after a due process type hearing, 4 N.Y.C.R.R. 4.5, New York Civil Service Law §75. At the end of the probationary term, the appointment becomes permanent unless probation is continued up to a maximum specified period. At the end of the initial or extended period of probation, the appointment becomes permanent unless the performance of the employee is not satisfactory in which case he can be terminated, 4 N.Y.C.R.R. 4.5(3).

Upon exhaustion of the eligible list for Correction Sergeants sometime in the Spring of 1972, the Department of Correctional Services appointed a number of individual Correction Officers as provisional Sergeants and communicated to the New York State Department of Civil Service its need for a new competitive examination to establish a new

eligible list for Correction Sergeants. The examination was prepared and the notice of examination, plaintiffs' exhibit 17 (A 1352), indicates that only individuals with service as Correction Hospital Senior Officer or Correction Hospital Charge Officer or Correction Officer were eligible to take the examination and that only those individuals with three years of service in the subordinate positions could be appointed. The examination was duly administered on October 14, 1972 and an eligible list was promulgated on March 15, 1973.

This action was commenced on April 10, 1973 and a temporary restraining order was made and entered forthwith directing the defendants not to make permanent appointments from the list and prohibiting the defendants from terminating the provisional appointments of plaintiffs or members of their class. Under this preliminary order all provisional sergeants who had failed the examination but did not belong to the class purportedly represented by plaintiffs automatically reverted to the position of Correction Officer. Among all of the provisional Sergeants who failed the examination, only the named plaintiffs and the several other black or hispanic provisional Sergeants who failed the examination were held in the position of

provisional Sergeant.

The Record before this Court does not reveal the comparative standing of the provisional Sergeants thus retained in the promotional positions vis-a-vis other minority applicants who took and failed the examination. The Record does reveal that at least one minority candidate the intervenor, Albert M. Ribeiro, is a minority citizen who took and successfully passed the examination at a high enough position on the list to be appointed.

The complaint alleges a class of plaintiffs of approximately four hundred forty persons, and on its face it is apparent that the defendants were aware of the name and addresses of every one of the members of the class since all of them were employed by the State of New York at the time when they took the examination in issue. Any of the individuals whose employment has been terminated and are not on the State roles would seem to have surrendered any interest which they might have in appointment to the promotional position. Despite this the plaintiffs allege in paragraph 2 (c) of their complaint (A 9) that the number of persons makes joinder of all class members impracticable.

The plaintiffs, as revealed by complaint paragraphs 11, 12 and 13 (A 17 - A 18), had extensive and detailed

knowledge of the eligible list and of the fact that permanent appointments would be made beginning on April 11, 1973. As early as April 4, 1973 the plaintiff Hayes was aware that on April 12 the Department would appoint ninety Sergeants from the eligible list (A 41) and the plaintiff Kirkland would appear to have had a copy of the eligible list early in April as shown by paragraph 11 of his affidavit on the motion for a temporary restraining order (A 47).

Attorney Deborah Greenberg's affidavit on the same motion (A 51 - A 52) would seem to indicate that she had studied the eligible list when she signed her affidavit on April 10, 1973.

The Judge below at an early date recognized the prejudice and impact upon the successful applicants who were among the ninety appointees as is witnessed by the provisions of his order dated April 11, 1973 particularly the portions thereof appearing at A 62 - A 64. The same order appears to be repeated at A 66 - A 68.

Neither of the intervenors, both successful candidates on examination 34-944, were named as parties defendant nor did the Court, the defendants or the plaintiffs ever take any affirmative or formal steps to notify these individuals or other individuals on the

eligible list of the pending litigation or their opportunity to participate.

Rule 19 of the Federal Rules of Civil Procedure relates to the joinder of persons needed for a just adjudication. Subdivision A describes the persons to be joined if feasible. A simple awareness of the property interest acquired by the intervenors and all other named on the eligible list makes it obvious that they fall squarely within the class of persons described in Rule 19 (a). That Rule provides most explicitly with respect to such persons:

> "If he has not been so joined the Court shall order that he be made a party."

The Rule is not permissive, it is a mandate. Furthermore, subdivision C of Rule 19 provides as follows:

> "A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons described in subdivision (a) (1) - (2) hereof who are not joined, and the reasons why they are not joined."

Nowhere in the complaint can one find the slightest allegation as to the names of the successful applicants on the eligible list or the reasons why they had not been joined or an allegation that their names are unknown to the plaintiffs.

There can be no doubt, particularly in view of the striking failure of the plaintiffs to deny knowledge upon

the intervenors' motion for intervention, that the plaintiffs were aware of the identity of the successful applicants at the time when their law suit was commenced and that the District Judge was perhaps aware of their identity in the very first days of the action or, at the very least was aware that there was an eligible list containing the names of a substantial number of State employees with an interest relating to the subject of the action and so situated that the disposition of the action in their absence might as a practical matter impair or impede their ability to protect that interest. It seems obvious that the District Judge continued to be acutely aware of the conflict and he stated in his decision (A 153):

> "The competing interests are vital to the named parties, to other individuals who may be affected by the outcome and to the public at large. Plaintiffs . . . efforts bring them into conflict with those individuals who passed the challenged examination and have a vested interest in securing the promotions which are rightfully theirs if the examination is unheld. For both groups, the outcome is critical since it affects their ability to earn a living by advancing in the profession of their choice."

Nevertheless the learned District Judge not only failed to comply with the mandate of Rule 19 (a) and failed to require the plaintiffs in their complaint to

comply with the provisions of Rule 19 (c) but at an early date in the litigation denied the application of other interested parties to intervene in the proceeding. The docket entries reproduced at pages A 2 - A 5 of the Record do not appear to reveal the application to intervene filed in June or July of 1973, however, there is an entry of July 16, 1973 of an affidavit of Stanley L. Kantor, (an Assitant Attorney General) in opposition to a motion to intervene and a memorandum filed by the plaintiff on the same day in opposition to an application for intervention by white provisional Correction Sergeant Jackson. Attached hereto marked Exhibit 2 is a copy of the Endorsement of the District Judge denying the Jackson application for intervention. It is interesting to note the preoccupation of the District Judge with expeditious determination of the proceeding some three months after it was commenced in sharp contrast to the lapse of approximately eight months after the trial before the District Judge rendered his decision.

Expeditious disposition of litigation is an admirable goal, however, the attainment of that goal does not take priority over the guarantees of due process.

On the trial the plaintiffs were not content to rely solely upon the statistical variation for proof of their prima facie case but called a number of witnesses. The witnesses Young, Suggs, Hayes, Kimble, Kirkland, Holman, O'Neil and Liburd were all Correction Officers or provisional Sergeants. During their testimony they all expressly or impliedly repeated the conclusions voiced by Officer Young at A 284 - A 285 as follows:

> "Q. Did you feel that that examination was related to the skills and abilities that you were using on that job?
>
> A. I can't recall all of the questions of the exam at this time. I will say if there was any part unrelated it was the comprehensive part of the exam.
>
> Q. What is the comprehensive part?
>
> A. The reading comprehensive part of the exam.
>
> Q. Would you state that that was unrelated?
>
> A. I would state that was unrelated."

During the examination of the witness Kimble (A 437 - A 441) a similar line of question was pursued by the plaintiffs. At page 440 the District Judge remarked that such testimony "May be relevant to job relatedness".

The plaintiffs called Dr. Richard Barrett as a rebuttal witness. Dr. Barrett qualified as an expert in testing and equal employment opportunity litigation. Dr. Barrett has impressive credentials, however, it would appear that his sole knowledge with respect to the particular job in issue, Correction Sergeant, is based upon his discussions with the attorneys for the plaintiff, reading of largely unidentified documents and one day spent at the correctional facility at Greenhaven and attendance at Court (A 1107). During his lone visit to a correctional institution he spent about five hours inside of the prison and talked to eight Sergeants (A 1108). By attendance at Court Dr. Barrett apparently heard the testimony of the various Correction Officers and provisional Sergeants called by the plaintiffs. Nowhere in Dr. Barrett's testimony does it appear that he has any prior experience with regard to correctional institution type jobs, the closest being work that he has done with certain police departments.

The ultimate issue in this case, so far as the validity of the test is concerned, is the question of job relatedness. The State's expert declined to testify that the test was job related (A 1045 - A 1047), however, the plaintiffs expert Barrett testified (A 1132):

> "I feel I can raise some questions about the content validity but I don't believe that I can state definitely as a professional that it is or is not content valid."

Dr. Barrett would go no further than expressing his substantial doubts as to whether the test was valid (A 1131 - A 1133).

As though being aware of the inadequate sampling of Dr. Barrett and the uncertainty of his opinion the District Judge referred to the testimony involving the job relatedness of some of the questions on the examination (A 185 - A 186). Only two of the questions referred to (A 778 - A 790 and A 1010) were questioned by the State witnesses as to their job relatedness and even that questioning was far less than conclusive. In sum, the testimony regarding the individual questions were that of a provisional Sergeant (Suggs) and a Dr. Barrett based upon his single visit to one correctional facility and interview with eight Sergeants.

While the interveners-appellants in this brief will not undertake a complete analysis of the testimony regarding the examination and are well aware that the burden of proof is on the State, the relative scarcity of credible testimony based upon actual experience or factual knowledge regarding job relatedness emphasizes the prejudicial

consequences to the interveners-appellants of the failure to include them in the litigation from the outset.

Many of the individuals in the class which the interveners-appellants seek to represent were provisional Sergeants. They are at least as well qualified as the provisional Sergeant witnesses of the plaintiffs to testify regarding the job relatedness of various items on the examination. At the very least, these men represented by counsel of their choice or class representatives acting on their behalf should have been afforded a full and complete opportunity to appear, participate and if so advised, to testify regarding their background, experience and opinions as to the job relatedness of the examination. Obviously, the plaintiffs did not seek to represent the interest of those men on the eligible list nor, unfortunately, did the State. While the interests of the State may be somewhat parallel to those of the interveners-appellants, the interests are by no means identical and the State sought to sustain its examination for its own purpose only and not from the point of view of the successful candidates. Had the interveners-appellants been parties to the litigation, as we contend was required by law, substantial additional testimony in support of the examination would undoubtedly had been before

the District Judge and the experts with the result that the defendants' burden might have been successfully sustained and a different conclusion might well have been reached.

POINT I

INTERVENERS-APPELLANTS AND THE CLASS WHICH THEY SEEK TO REPRESENT ARE INDISPENSABLE PARTIES AND THE FAILURE TO JOIN THEM IN THE ACTION BEFORE THE TRIAL DEPRIVES THEM OF THEIR PROPERTY RIGHTS WITHOUT DUE PROCESS OF LAW AND THE COMPLAINT SHOULD BE DISMISSED.

The interveners-appellants and the class which they seek to represent acquired a vested property right by reason of their successful competition in the examination if the examination is valid. We have already discussed the statutes giving rise to this property interest and the District Judge (A 153) recognized that those men who had succeeded in the examination had a vested interest in securing the promotions which would normally follow. To proceed with the litigation in the absence of these citizens was not only violative of the sections of the Federal Rules heretofore cited but also totally failed to heed the teachings of recent authoritative decisions regarding the rights of public employees to due process hearings where job rights are involved.

The overwhelming weight of modern authority in a wide variety of situations mandates the right to a meaningful due process type hearing before a citizen is deprived of either property or liberty. Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011; Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983; Bell v. Burson, 402 U.S. 535, 91 S. Ct. 1586; Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S. Ct. 1820; Wisconsin v. Constantineau, 400 U.S. 433, 91 S. Ct. 507; Groppi v. Leslie, 404 U.S. 496, 91 S. Ct. 490; Boddie v. Connecticut, 401 U.S. 371, 91 S. Ct. 780; Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701 and Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694.

While only Roth and Sindermann dealt with public employees, the teaching of the other cases mentioned was that any governmental taking of property or liberty without a prior hearing is constitutionally impermissible except in cases of an overriding State interest or extraordinary situations justifying the postponing of notice and opportunity for a hearing.

The expression of the high court in Boddie v. Connecticut, 401 U.S. 371 at 378, 91 S. Ct. 780 at 786 seems to best sum up the pre-Arnett rule of the Supreme Court:

> "What the Constitution does require is 'an opportunity . . . granted at a meaningful time and in a meaningful manner', . . . 'for a hearing appropriate to the nature of the case' . . . . The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. That the hearing required by due process is subject to waiver, and is not fixed in form, does not affect its root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event. In short, 'within the limits of practicability; . . . a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause."

Property rights of public employees were specifically considered in Roth and Sindermann and the rule which can be drawn from these cases is that a public employee who has a reasonable expectation of continued employment based upon either express rules, regulations or statutory provisions or upon past practice is entitled to a due process hearing before being deprived of those interests.

In the case at bar, the very existence or non-existence of a property right in the intervenors-appellants and their class is a central question to the

litigation. To proceed with a determination in the absence of those individuals whose property rights and liberty rights are involved is the absolute antithesis of due process. Even if we assume arguendo that a property right had not become vested in the intevenors-appellants, the opportunity to pursue one's chosen vocation, and to seek and attain advancement therein would appear to be a liberty right which is fully protected by the guarantees of due process under the Fifth Amendment of the Constitution of the United States.

The proposition that the constitutional mandate of due process is as binding upon the Federal Courts as other federal agencies does not seem to require citation.

The most recent decision of the Supreme Court of the United States regarding employees due process rights is Arnett v. Kennedy, 416 U.S. 94 Sup. Ct. 1633. While the multiplicity of opinions in Arnett is confusing, we have the words of the high court itself for the meaning of Arnett which it analyzed in Wolff v. McDonnell, U.S. , 94 Sup. Ct. 2963 at 2975 wherein it cites Roth and Arnett for the proposition:

> "The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests . . .

> The requirement of some kind of a hearing applies to the taking of private property . . or to government . created jobs held absent 'cause' for termination."

The classic definition of parties who should or must be joined in a suit in equity before a Federal Court is found in Shields against Barrow, 58 U.S. (17 How.) 130 (1855) at page 139:

> "3. Persons who . . have an interest of such a nature that a final decree can not be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience are indispensable parties."

The distinction at that early date drawn by the Court between what are now generally thought of as "conditionally necessary" and "indispensable" parties has been carried forward into Rules 19 (a) and 19 (b) of the Federal Rules of Civil Procedure. Intervenors-appellants herein are by any standard indispensable.

Although ordinarily an adjudication can not legally bind an absent party, the determination of the rights of the parties present in the case at bar will have a devastating adverse effect upon the absentee's interests.

In cases where a similar substantial adverse effect would be imposed upon a absentee, joinder has been held to be necessary. Thus all beneficiaries or legatees of a trust or estate have been held to be indispensable to an action, when the trustee or executor has an adverse interest. See eg., Young v. Powell, 179 Fed. 2d 147 (5th Cir.), cert. den'd., 339 U.S. 948 (1950); Baird v. People's Bank & Trust Co., 120 Fed. 2d 1001 (3rd Cir. 1941). Where a trustee was sued in connection with the distribution of a fund in which an absentee claimed a superior interest, while the litigation would not affect the absentee's legal claim to the fund, the absentee would find his claim of little value once the fund was dispersed. Under the circumstances the absentee was held to be an indispensable party. Roos v. Texas Co., 23 Fed. 2d 171 (2nd Cir. 1927), cert. den'd., 2770 U.S. 587 (1928); see also United States v. Bank of New York & Trust Co., 296 U.S. 463 (1936). In the case at bar the District Judge in deciding the legal issue between the parties present before him necessarily weighed the relative rights of the plaintiffs and the absentee applicants for the position of correction sergeant. The judgment has a direct factual impact upon the absentees and the interest of the absentees being present should prevail

over the plaintiffs' interest in proceeding with the suit.

In a case somewhat analogous to the instant matter, the National Railroad Adjustment Board issued conflicting orders as to which of two unions were entitled to a particular job. One union sought court enforcement of its award, the other union, since its members would have been dispossessed of their rights, had to be joined. Order of R. R. Telegraphers v. New Orleans, Texas and Mexican Railway, 229 Fed.2d 559 (8th Cir.), cert. den'd., 350 U.S. 997 (1956). A similar result has been reached where the full disposition of the case required consideration of the competing claims of two unions, Missouri, Kansas, Texas Railroad v. Brotherhood of Railway and Steamship Clerks, 188 Fed.2d 302, 305-306 (7th Cir. 1951) and where a plaintiff sought to establish the invalidity of the charter of an absentee corporate defendant, Northern Ind. Railroad v. Michigan Central Railroad, 56 U.S. (15 How.) 233 (1853).

While it may well be that where the Court is assured that the absentee had notice of the pending action it should consider the availability of intervention to the absentee, these considerations would not appear to militate against the intervenors-appellants in the case

at bar. There is no showing in the Record before this Court that the eight-seven (87) persons from the eligible list appointed in April 1973 (A-197), the one hundred eighteen (118) persons presently employed as provisional correction sergeants, or the five hundred one (501) persons who successfully passed Examination 34-944 (A-213) received any notice sufficient to require their early intervention as a matter of law. The interest in challenging the examination centered at the correctional facilities at Sing Sing and Greenhaven but correction sergeants are employed throughout the State and there is no indication whatsoever that the interested parties at more distant facilities were aware of the litigation or their right to participate therein for the protection of their interests. In addition when the District Judge was confronted with an application to intervene prior to the time of trial he denied the application for intervention as previously pointed out.

Yet a further alternative might have been available to the District Court confronted with absent indispensable parties since it might have shaped its decree so as to mitigate the impact on the absentee and avoid a determination of indispensability. This the District Court declined to do in its final decree (A-241-A-245) since it enjoined the present defendants from making permanent any provi-

sional appointments based upon Examination 34-944 and directed that all interim appointments be made on the basis of a racial quota which obviously will adversely effect the standing of at least some of the class which the intervenors seek to represent.

Supplementing its original decree, the Court, without notice to the intervenors, issued a supplemental decree on September 18, 1974, a copy is annexed hereto as Exhibit 3. Neither in the original decree nor in the supplemental decree does the District Court provide for participation of the intervenors-appellants in the interim selection procedure or the final selection procedure. In short the District Court proceeded in total disregard of the rights of the intervenors-appellants and their class throughout this proceeding, even down to the supplemental decree.

Under Rule 12(h) of the Federal Rules this Court has the discretion to consider indispensability on its own motion and should do so in this case where it is called upon to protect the legitimate interests of absentees from the trial.

Under Rules 19 and 21 of the Federal Rules, the District Court had discretion in adding indispensable parties. The intervenors-appellants were amenable to the process of the Court and would not have destroyed

proper venue. The Court below could have allowed plaintiffs to amend their complaint to add the indispensable parties or summon them on its own motion. The Court below made no attempt to do any of these things. Furthermore, the trial court had the power to dismiss the complaint in the absence of the indispensable parties amenable to the process of the Court where the plaintiff made no attempt to join the absentees. See eg., United States v. Elfer, 246 Fed.2d 941 (9th Cir. 1957). Under all of the circumstances in the case at bar, the plaintiffs, the defendants and the District Court having totally failed to bring the interested absentees before the Court in a timely fashion to afford them an opportunity to protect their property interests, the complaint should be dismissed.

POINT II

THE DISTRICT COURT SHOULD HAVE ALLOWED APPOINTMENTS FROM THE ELIGIBLE LIST CREATED BY EXAMINATION 34-944 TO BECOME PERMANENT AND SHOULD NOT HAVE DIRECTED THE USE OF A ONE TO THREE PREFERENTIAL APPOINTMENT RATIO IN EITHER INTERIM OR FINAL APPOINTMENT PROCEDURES.

In the case at bar as in Griggs v. Duke Power Company, 401 U.S. 424 (1971) and Chance v. Board of Examiners, 458 F.2d 1167 (1972), there is no proof of any intentional discrimination but proof that the examination had a disparate pass-fail ratio for blacks and Hispanics as against whites, and was not proved to be job related. There is no proof in the case at bar of any past discrimination and the District Court made no such finding.

This Court has sustained hiring quotas in U.S. v. Wood, Wire, and Metal Lathers International Union, Local 46, 471 F.2d 408, Cert. Den. 412 U.S. 939, (1973); Vulcan Society of New York City Fire Department, Inc. v. The Civil Service Commission, 490 F.2d 387, (1973); Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Commission, 482 F.2d 1333, (1973); Rios v. Steamfitters Local 638, F.2d , 8 FEP Cases 293

(June 1974). All are distinguishable.

Lathers involved intentional discrimination and a quota to correct past discriminatory practices which continued even after the action was started, the Lathers court recognized that "quotas merely to attain racial balance are forbidden".

By contrast with Lathers, under the District Court order in the case at bar, lower qualified minority members will be preferred over better qualified whites.

.ios involved continuing intentional discrimination. Although preferential hiring quotas were upheld, this Court pointed out that when a racial imbalance is unrelated to past discrimination no justification exists for ordering that preference be given to anyone on account of his race or for altering an existing hiring system or practice.

Bridgeport Guardians and Vulcan Society involved Civil Service examinations in which interim quotas were gingerly sustained pending the preparation of a validated non-discriminatory selection procedure. In both cases quotas were approved to correct the effects of past discrimination. In the case at bar only one examination is involved, no past discrimination has been shown and in fact extensive efforts have been demonstrated to achieve racial balance.

There have been positive steps to recruit minority personnel, particularly in the entry position and thus the pool of eligibles for examination and promotion has been enlarged.

State discrimination on grounds of race is prohibited by the Equal Protection Clause of the Fourteenth Amendment. See eg. McLaughlin v. Florida, 379 U.S. 184 (1964).

A quota in favor of non-whites is a classification on the basis of race.

The District Court erroneously failed to even restrict the preference to members of the aggrieved class. See eg. Castro v. Beecher, 459 F.2d 725 (1971), which upheld an interim hiring method granting preference to minority group members who had actually taken and failed a discriminatory test but later passed the new validated test. Consequently, those individuals who had been discriminated against were eligible for a preference but the trial court here has accorded a preference to any black or Hispanic, a preference which is without rational basis or legal support.

As was said by the United States Supreme Court in Milliken v. Bradley, 42 U.S. Law Week 5249, July 25, 1974, "The task is to correct by a balancing of the individual

and collective interests the condition that offends the Constitution" but the power should be used "only on the basis of a constitutional violation".

Chief Justice Burger, stated:

> "The controlling principle, consistently expounded in our holdings, is that the scope of the remedy is determined by the nature and extent of the constitutional violation . . . an inter-district remedy might be in order where the racially discriminatory acts of one or more school districts cause racial segregation in an adjacent district or where district lines had been deliberately drawn on the basis of race . . . Conversely, without inter-district effect, there is no constitutional wrong calling for any inter-district remedy".

Intervenors-appellants agree that a new validated non-discriminatory test be prepared forthwith but we earnestly oppose as unjustified the remedy of hiring quotas either before or after the new selection procedure. A single test adopted in good faith but declared after trial not to be job related does not justify such drastic dismantling of the Civil Service system.

The cornerstone of a professional civil service is the concept of appointment and proportion based upon merit, fitness and ability. In New York State the guarantee concerning merit is contained in the New York State Constitution, Section 6, Article 5:

> "Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which as far as practicable, shall be competitive; . . ."

The New York State Civil Service Law provides a statutory implementation of this constitutional mandate which has a long and honorable history of successful administration.

Neither plaintiffs nor the State purport to urge any merit basis for promotion to sergeant. The introduction of nonmerit procedures and standards would contravene not only the State Constitution and Civil Service Law but would also violate the EEOC Guidelines since merit is closely associated with job success and criteria. Furthermore, such a procedure would deny equal protection of the law to the intervenors and their class.

The District Court has ordered a quota without mandating any objective showing of relative qualifications. This action is grossly racially discriminatory since many white provisional correction sergeants were not retained because they too failed the examination and men, both black (Ribeiro) and white have passed the test and successfully worked as provisional sergeants. The only qualification that plaintiffs apparently claim is satisfactory is on the job performance, yet both the white disqualified provi-

sional and all sergeants appointed from the eligible list have likewise satisfactorily performed. The plaintiffs do not even seek the appointment of the most highly qualified minority correction officers since a number of minority candidates scored higher on the test than the named plaintiffs and some of them are in the class of intervenors. This is offensive to the concept of merit, denies equal protection of the law and should not be countenanced by this Court.

The District Court has in practical effort ordered a criterion validated examination. It ignored the consequences to all correction officers and provisional correction sergeants that flow from this demand. All agree that the construction of valid criteria for any position is a time consuming task and the possibility exists that even after a large investment of time, valid criteria may not be established.

This seemingly joint disregard for prompt action in this highly crucial matter is offensive to the system long and successfully operated under the New York Constitution and the New York State Civil Service Law. This Court should endeavor to fashion a remedy consistent with those articles, not destructive of them.

If the merit system is to function it is necessary

that there be a minimum of delay in the creation and administration of a valid test and thereafter a minimum of delay in establishing a promotional list. The State of New York has the facilities to proceed with all due dispatch in the creation of a valid examination for the position of correction sergeant.

The Court should, as an interim measure, require the prompt creation of an examination validated by any acceptable method considering the following points:

1. The creation of any validated examination will be a time consuming process.

2. The effect of the decision in this case invalidating examination 34-944 is to leave all current correction officers, white, black and hispanic, without any method of advancing in their choosen profession.

3. The experts agree that the development of a criterion validated test must be conditioned upon the development of valid criteria, a process that is by no means certain.

4. The development of alternate methods of testing will require a long period of time even if feasible under EEOC Guidelines.

5. The pool of permanent sergeants is continually being depleated due to advancement, retirement, death

and resignation.

6. Any attempt to maintain the sergeant pool by provisional appointments suffers the very infirmity complained of by plaintiffs in paragraph 18 of their complaint, that is lack of interinstitutional mobility since very few persons, if any, will accept the hardships of relocation for a provisional appointment.

7. The continuation of the uncertainty of appointments will adversely effect the public interest, the private interest of all correction officers and of all members of the classes represented by the named intervenors, the named plaintiffs, and the State.

The District Court held that the State did not meet its burden of demonstrating strong probabilities that the test 34-944 was job related. The only proven vice of the examination was a statistical discrimination against the racial and cultural group represented by plaintiffs. In holding that the test was not fair within the mentioned limits there was no holding that the examination was not valid within the various social and ethnic groups.

Despite the experts opinions, examination 34-944 has shown predictive validity at least as to those officers who received appointments from the promotion list and who

have successfully filled the job for over a year. No party to this action has contended that the correction officer who passes examination 34-944 with high marks is for that reason unqualified for the position of correction sergeant. There has been no showing that there exists a negative correlation between the examination mark and the ability to properly function as a correction sergeant. In fact, the named intervenors and those of their class who have been appointed to the position of correction sergeant have performed the tasks required in a satisfactory and acceptable manner and make up a significant segment of the correction sergeants in the New York State Correctional System.

All the officers promoted from the promotion list generated by examination 34-944 were promoted to permanent positions but for this action. The State presumably followed its own rules and regulations for evaluating those officers as correction sergeants during service in the position. The New York State Civil Service Department Rules and Regulations provide for an 8 to 26 week probationary term for all promotions with reversion to the previous lower rank if the appointee is found to be lacking in capacity, conduct or performance. Presumably the sergeants promoted from the 34-944 list were so evaluated and found satisfactory since none were demoted back

to correction officers and the State in this action has asserted that all sergeants promoted from the list are satisfactory.

The rules and regulations except temporary and provisional appointments so that the nared plaintiff and the five other officers similarly situated were presumably not so evaluated during their provisional service and can not claim that they passed any probationary period or on the job evaluations successfully.

It is the intervenors -appellants contention that examination 34-944 is a more accurate predictor of ability to properly perform the duties of correction sergeant than a recommendation of one or t[illegible] supervisors. The named plaintiffs and the five other officers so situated received their provisional appointments on recommendation from their supervisors based on no proven valid criteria. The named intervenors and those of their class who have been appointed correction sergeants are more qualified than the named plaintiffs to hold their positions. The satisfactory performance of the class members as correction sergeant in fact provides a post-validation of examination 34-944 as to those officers who received appointments as a result of the examination.

The intervenors suggest that an order be entered providing for the permanent appointment to the position of correction sergeant of all of the correction sergeants appointed from the 34-944 eligible list who now have satisfactorily completed and who hereafter satisfactorily complete the twelve week provisional period.

This interim relief would have the following effects:

1. Prevent an unjust and inequitable penalization of the employees who participated and succeeded in the selection procedure in good faith and without fault.

2. Prevent a chaotic situation from developing in the correctional system.

3. Provide for the manning of the vital position of correction sergeant by persons demonstratably suited for the positions.

4. Provide a rational basis for the selection of permanent correction sergeants until the required examination can be prepared.

In Chance v. Board of Examiner, 458 F.2d 1167, (Second Circuit, 1972) the court accepted the appointment of "acting" supervisors. Such a procedure here would be totally unworkable and unjust. The fact situation in this case is very different from the fact situation in

Chance. In Chance all of the positions were located in the City of New York, in this case the positions are located throughout the New York State. In Chance it was not necessary for an "acting" superviser to move his residence and foresake his community in order to accept an "acting" supervision position. In this case many persons have been forced to move their residence or to establish a second residence for the purpose of taking a Sergeant's appointment. In Chance, id 1178, there was a finding that the injunctions would cause no "great harm" to the public or to school children in view of the availability of acting appointments in New York City. In the case at bar there will be harm to the public because the availability of provisional Sergeants will be low because of the actual hardships encountered.

Taking into account all of the facets of this case, the balance of hardships does not favor the plaintiffs compared to the intervenors.

The true victims of this action are the intervenors and the class which they represent. These men fulfilled all of the requirements of a promotion set by the State, many of them have been forced to change their residences or maintain separate abodes apart from their families. All of them have surrendered their position as Correction

Officers and if their appointments are not confirmed each will revert by operation of the New York State Civil Service Law to the position of Correction Officer. Moreover they will not return to the positions which they held prior to their appointments to Correctional Sergeant but will be forced to take positions now open and of the least desirable nature since under the contract between the State of New York and Security Unit Employees, Council 82, AFSCME, AFL-CIO, now in effect the persons now acting as provisional Correction Sergeants cannot bump the officers who have taken their old positions and who now hold permanent appointments.

When objectively considered, a highly inequitable and discriminatory result is obvious. The permanent appointment of the named plaintiffs and the five other officers holding provisional appointments to the position of Correction Sergeant and other quota beneficiaries to the exclusion of all the officers holding provisional appointments as Correction Sergeant as the results of passing examination 34-944, would result in a highly artifical class eligible for the next examination for the position of Lieutenant. In fact the requested remedy will allow the named plaintiffs and five other

officers so situated several attempts at the position of Lieutenant while all of the other Correction Officers and provisional Correction Sergeants are barred from advancing even to the permanent position of sergeant and this bar would act against all white, black and hispanic officers. In other words success will be penalized. After all, what is more unjust than depriving intervenor-appellant Ribeiro of his hard won promotion. Does his success make him less worthy.

The racial composition of the Department of Correctional Services staff taken from the State trial memoranda in this case is summarized below:

	1/1/73	5/1/73	2/20/74
White	89.7%	88.8%	86.0%
Black	8.6%	8.5%	10.9%
Hispanic	1.7%	2.7%	3.1%
Total Minority	10.3%	11.2%	14.0%

The trend is clear from these statistics that the representation of blacks is increasing in the entry level pool. From these statistics and from the testimony at trial it appears that the number of minority Correction Officers has greatly increased in the last few years although until the last examination only a few minority officers were sufficiently experienced to qualify for the Correction Sergeant examination.

The imposition of quotas for promotion would result in the high probability that less quallfied minority Correction Officers would receive appointments to the permanent position of Correction Sergeant to the detriment of better qualified white and minority correction officers. After the disaster at the Attica correctional facility it is necessary to assure that the best possible officers man each position in the correctional facilities.

The basis of the relief sought by plaintiffs is that minority groups should be fairly represented at the level of Correction Sergeant. The intervenors-appellants agree that minority groups should be fairly represented but we do not agree that fair representation requires absolute numerical representation.

We respectfully submit that the seniority requirements imposed by the State for promotion to sergeant (two years employment as Correction Officer before taking the promotional examination and three years employment as Correction Officer before promotion to Correction Sergeant) are in furtherance of a valid state interest and do not impose unnecessary restrictions upon minority advancement in the Correction Officer series. The intervenors-appellants submit that absolute numerical representation would be unfair to Correction Officers in general, since

the percentage of minority group members has expanded drastically in the last three years, and since minority groups are over represented in the low seniority position due to this rapid increase in employment. Thus, minority representation should not be based upon the number of minority members, but upon the number of minority members eligible for promotion through the acquisition of experience on the job.

This Court should also consider that the recent transfer of the Bayview and Edgecomb facilities from the Narcotics Addiction Control Commission to the Department entailed the transfer of the staff of these facilities from the Narcotics Addiction Control Commission to the Department. These facilities are staffed by officers who are almost exclusively members of the minority groups at all levels, including Correction Sergeant (formerly charge officer). The addition of minority group Sergeants from Bayview and Edgecomb should thus be considered in determining the necessity of making remedial appointments of minority group members to the position of Correction Sergeant.

The intervenors-appellants seek a middle ground between the polar views of the District Court and the plaintiffs on one hand and defendants on the other. We seek the prompt construction of an examination validated

by any recognized method, based upon the past experience of the State in promotional testing and the requirement that the examination be constructed free from constitutional taint.

The New York State Civil Service Commission and the New York State Department of Correctional Services are both large organizations with impressive resources. Moreover, both have access to the larger and even more impressive resources of the State of New York. Any claim that the prompt creation of a validated examination for the position of Correction Sergeant would place a strain upon these resources appears to be highly artificial.

This action has forced the State into an indepth examination of the position of Correction Sergeant and should by this time have produced a detailed job analysis sufficient to support the development of a valid, job related examination. Also the methods project already undertaken by the State covering the position of Correction Sergeant should reduce any burden in creating a new examination.

The intervenors-appellants do not dispute the possible necessity of creating new forms of testing or the possible necessity of a criterion validation for future examinations. However, even with the vast resources available to the State, the intervenors-

appellants question the possibility of creating such an examination within a reasonable period of time, and question the necessity of such a remedy at this time. The Court should consider the fact that over 4,000 Correction Officers have been prevented from normal promotion opportunity since August 1972 and any unnecessary delay in the creation of a new examination would unduly prejudice all Correction Officers including those represented by the plaintiffs.

Intervenors-appellants agree with the need for continuing supervision of this Court over the construction of a new, validated, job related examination involving all parties to this appeal. In order that such supervision be of any practical value it is necessary that a fully adversary hearing be held to inquire into the validity and validation of the new examination. Full supporting data should be required to be delivered to the attorneys for the plaintiffs and to the attorneys for the intervenors-appellants to enable the Court to have the widest possible variety of objections and comments concerning the proposed new examination. The plaintiffs' attorneys would insure against the inclusion of any material that is prejudicial to the rights of minority members. The attorneys for the intervenors-

appellants would provide protection against materials that were prejudicial against all other Correction Officers.

Any proposal by the State calling for its development of a new examination lacking scrutiny by the parties to this action and by the Court simply asks for a repetition of this lawsuit. For the good of all persons involved whether parties or nonparties it is necessary that there be a final conclusion to the problem presented in this action.

In an earlier memoranda, the plaintiffs conceded that but for the temporary restraining order the eighty-seven Correction Officers who received provisional promotion to the position of Correction Sergeant on or before April 12th, 1973 would have received permanent appointments to that position effective as of April 12th, 1973. In light of the States continuing needs, it is not necessary to bar these Correction Officers from the position of Correction Sergeant in order to obtain full and adequate relief in this action.

Based on the principle that equity will do no unnecessary harm, this Court should refraim from taking any action which would deprive these officers of the position of Correction Sergeant.

The intervenors seek permanent appointments as Correction Sergeant for all other Correction Officers who received appointments as Correction Sergeants based upon their performance on examination 34-944.

The State of New York has already taken action which would obviate any need to remove these men from the position of Correction Sergeant in order to grant equitable relief. The State of New York has recently commenced a plan to transfer the Bayview and Edgecomb facilities from the Narcotic Addiction Control Commission to the Department of Correctional Services. Upon information and belief this transfer entails among other consequences, the transfer of 12 or 13 minority charge officers to the position of Correction Sergeant. Upon information and belief, these Sergeants would constitute approximately six percent of the total Correction Sergeants in the Department of Correctional Services. The intervenors-appellants are not implying that this transfer to the Department of Correctional Services of the Bayview and Edgecomb facilities is in any way an attempt to correct racial imbalances caused by past examinations but rather that this is a consequence of a valid State purpose in increasing the number of correctional facilities. Intervenors also point out that the State of New York

has not been uniformly successful in obtaining minority supervisory officers in the various series of institutional examinations and has not shown intentional prejudice against minority advancement.

These new minority Correction Sergeants, when coupled with the positions that have been unfilled since the date of decision in this action, and the new Correction Sergeants positions which have been authorized for the Department of Correctional Services, allow this Court sufficient latitude to achieve the results desired by the plaintiffs without harming any of the officers who were appointed Correction Sergeant as the result of examination 34-944.

The date of appointment as provisional Correction Sergeant should govern the date of permanent appointment and no harm is done to any party by such an order. To set any later date for the permanent appointment would cause damage to the officers by placing them lower on the seniority scale than their service in rank calls for and by possibly placing them lower on the pay scale than their length of service in rank requires.

The impact of the decision of the District Court falls not upon the State but rather the Correction Officers who in good faith took and passed examination 34-944.

There was no showing of a negative correlation between test results and ability or job preparedness. There was no showing that the examination did not fully and fairly distinguish ability and job preparedness within the various ethnic groups.

The intervenors urge this Court not to disregard the expectations and equities of those Correction Officers who successfully participated in examination 34-944, an examination which they did not know and could not know was constitutionally tainted.

A possible additional requirement could be added requiring all Correction Sergeants who were appointed since the trial to pass the new, validated examination in order to retain their permanent positions as Correction Sergeant.

No solution to this problem is going to please everyone but this Court should attempt to fashion a remedy which will assure constitutional fairness and do the least possible harm to all persons, whether parties or non-parties.

RRR/gc

CONCLUSION

THE DETERMINATION OF THE DISTRICT COURT SHOULD BE REVERSED, THE COMPLAINT SHOULD BE DISMISSED AND ALL APPOINTMENTS MADE TO THE POSITION OF CORRECTION SERGEANT AS THE RESULT OF EXAMINATION 34-944 SHOULD BE MADE PERMANENT. IN THE ALTERNATIVE THE DETERMINATION OF THE DISTRICT COURT SHOULD BE MODIFIED, ALL APPOINTMENTS MADE FROM THE ELIGIBLE LIST GENERATED BY EXAMINATION 34-944 SHOULD BE MADE PERMANENT, IN THE INTERIM THE COURT SHOULD ORDER SELECTION PROCEDURES DEVISED BASED ON MERIT WITHOUT THE IMPOSITION OF RATIO QUOTAS AND THE STATE SHOULD BE ORDERED TO DEVELOP A NEW CONSTITUTIONAL EXAMINATION UNDER THE SUPERVISION OF THE COURT WITH PARTICIPATION BY PLAINTIFFS AND INTERVENORS.

Dated: October 23, 1974
Albany, New York

Respectfully submitted,

SNEERINGER & ROWLEY P.C.
Attorneys for Intervenors-
Appellants
Office & P. O. Address
90 State Street
Albany, New York 12207
Tel. No. (518) 434-6188

RICHARD R. ROWLEY,
JEFFREY G. PLANT,
Of Counsel.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED
JUN 5 1973
M. E. L.

EDWARD L. KIRKLAND, et al.,

Plaintiffs,

vs.

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, et al.,

Defendants.

M. E. L.

73 Civ. 1548

ORDER

Upon all of the papers heretofore filed and the Court's having heard argument of counsel, it is hereby

ORDERED, that defendant deliver to plaintiffs' counsel on or before June 18, 1973, for each individual in each of the categories hereinafter set forth, the following information contained in such individual's personal history folder or other personnel record:

1) all educational entries;

2) all work experience;

3) all memoranda or documents relating to such employee which contain criticism, commendation, appraisal or rating of such individual's performance on his job;

The categories of persons about whom such information is to be provided are as follows:

1) all white employees of the Department of Correctional Services who held provisional appointments to the position of Correction Sergeant (Male) as of April 10, 1973, took examination Number 34944 and

a) passed the examination and ranked in the first 100 of those on the resulting

FILED JUN 5 1973

EXHIBIT #1

eligible list;

b) passed the examination and ranked below the first 100 on the resulting eligible list.

c) failed the examination;

2) all black employees of the Department who held provisional appointments to the position of Correction Sergeant (Male) as of April 10, 1973, took examination number 34944, and

a) passed the examination and ranked in the first 100 of those on the resulting eligible list;

b) passed the examination and ranked below the first 100 on the resulting eligible list;

c) failed the examination;

3) all white employees of the Department of Correctional Services who took examination number 34944 and

a) passed the examination and ranked from 1 to 20 on the resulting eligible list;

b) passed the examination and ranked from 201 to 220 on the resulting eligible list;

c) passed the examination and ranked from 387 to 406 on the resulting eligible list;

d) failed the examination, achieving scores from 65 through 65.9;

4) all black and Hispanic employees of the Department who took examination number 34944 and

a) passed the examination and ranked

from 1 to 20 on the resulting eligible list;

b) passed the examination and ranked from 201 to 220 on the resulting eligible list;

c) passed the examination and ranked from 387 to 406 on the resulting eligible list;

d) failed the examination, achieving scores from 65 through 65.9.

There shall be designated on each individual's record the category and sub-category or categories and sub-categories in which he falls.

No names or addresses shall be furnished to the press. SO ORDERED. Pursuant to Rule

Thomas J. Cahill
United States District Judge

Dated: June 4, 1973 at 5 P.M.

ENDORSEMENT

ROBERT JACKSON, et al., Plaintiffs, v. THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, et al., Defendants. 73 Civ. 1548

U.S. DISTRICT COURT FILED JUL 1 S.D.

LASKER, D.J.

The motion is denied. Although we do not agree with plaintiffs and defendants that the mere fact that the proposed intervenors may not have property rights in the position of correction sergeants is conclusive against their having a right to intervene, we nevertheless believe the motion should be denied for the following reasons:

(A) Untimeliness. This suit was commenced on April 10th, by the filing of a complaint and a motion for temporary relief. Counsel for the proposed intervenors acknowledges that the existence of the action and the order issued was known to the movants within a short time after the suit was brought, and, in the nature of the case, we believe it reasonable to infer that all persons interested in becoming correction sergeants learned of the suit at an early date, even if not formally notified. This application for intervention was not made until July 11th, only ten business days prior to the commencement of trial. To permit intervention so late in the game would result in the necessity of reopening discovery, which would be completely unacceptable, unless -- and this is the position which the intervenors have acknowledged in their papers -- the movants do not participate in the trial or proceedings relating to the merits of the case. True intervention would inevitably require a delay in the trial now set to commence July 23rd. In a matter affecting the assignment of correction sergeants in State institutions such a delay would clearly be prejudicial to all concerned, the plaintiffs, defendants and the public.

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(B) Questionability of Right to Intervene. Furthermore, while we have indicated some doubt that the lack of a property right by the proposed intervenors in the correction sergeant job establishes conclusively that they have no right to intervene, nevertheless whether they do have a right to intervene

EXHIBIT # 2

is far from clear. There is a serious question whether the interests they assert and seek to protect will be affected by the outcome of this lawsuit.

There are further complications: Among the group of proposed intervenors, interests conflict: some of them have passed the examination under attack and some have failed it. There is no indication whether movants wish to be aligned as plaintiffs or defendants or how they should be aligned.

(C) Modification of Existing Order. The true objectives of the proposed intervenors, as they acknowledge, is solely to secure a modification of the extended temporary restraining order presently in effect. In the exercise of our discretion, we decline to modify the order. To lift the ordered freeze in the present critical stage immediately prior to trial, and at a time close to a full determination of the issues of the case, would be disruptive and have an adverse affect on the morale of the Correction Service. Furthermore, movants have made no showing of irreparable harm to them pendente lite.

The motion is denied.

It is so ordered.

Dated: New York, New York
July 18th, 1973.

Irving R. Kaufman

U.S.D.J.

MICROFILM
SEP 19 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED
SEP 19 1974
S.D. OF N.Y.

EDWARD L. KIRKLAND and NATHANIEL HAYES, each individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

THE NEW YORK STATE DEPARTMENT OF CORRTIONAL SERVICES: RUSSELL OSWALD, individually and in his capacity as Commissioner of The New York State Department of Correctional Services; THE NEW YORK STATE CIVIL SERVICE COMMISSION: ERSA POSTON, individually and in her capacity as President of the New York Civil Service Commission and Civil Service Commissioner; MICHAEL N. SCEILSI and CHARLES F. STOCKMEISTER, each individually and in his capacity as Civil Service Commissioner,

Defendants.

SUPPLEMENTAL ORDER AND DECREE

73 Civ. 1548 MEL

Application having been made herein by defendants for clarification and/or supplementation of the Order and Decree of this Court dated July 31, 1974, regarding the appointment of provisional Correction Sergeants (Male) pending the implementation of the interim selection procedure for permanent appointments and/or the final selection procedure of permanent appointments, and argument having been had upon said application, and upon due consideration, it is

ORDERED, ADJUDGED AND DECREED that the Order and Decree of this Court in the above captioned action, dated July 31, 1974 be and hereby is supplemented as follows:

a. Defendants are authorized to make provisional appointments to the position of Correction Sergeant (Male) pending the implementation of the interim selection procedure for permanent appointments and/or the final selection procedure for

EXHIBIT #3

permanent appointments, subject to the conditions set forth herein, for a period not exceeding six (6) months unless extended by the court for good cause shown.

b. Said appointments shall be made only with the permission of the court upon five days written notice to the court and to the attorneys for the plaintiffs. Said notice shall set forth the number of appointments to be made and the reasons therefor and shall include, in summary form, the ethnic/racial identification of the prospective provisional appointees

c. Prospective provisional appointees shall be advised that the duration of their appointments shall be no more than six (6) months unless extended for good cause shown with the approval of the court.

Dated: New York, New York
September 18, 1974

Alexander Cabranes
U. S. D. J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EDWARD L. KIRKLAND and NATHANIEL HAYES, each individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

-against-

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES; RUSSELL OSWALD, individually and in his capacity as Commissioner of the New York State Department of Correctional Services; THE NEW YORK STATE CIVIL SERVICE COMMISSION; ERSA POSTON, individually and in her capacity as President of the New York State Civil Service Commission and Civil Service Commissioner; MICHAEL N. SCELSI and CHARLES F. STOCKMEISTER, each individually and in his capacity as Civil Service Commissioner,

Defendants-Appellants,

-and-

ALBERT M. RIBEIRO and HNERY L. COONS,

Intervenors-Appellants.

AFFIDAVIT OF SERVICE

Docket No.
74-2116

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

Gayle Corbisiero, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 217 Jackson Avenue, Schenectady, New York. That on the 24th day of October, 1974 deponent served two (2) copies of the Brief for Intervenors-Appellants upon Hon. Louis J. Lefkowitz,

Attorney General of the State of New York, Attorney for Defendants-Appellants at 2 World Trade Center, New York, New York 10047 and upon Jack Greenberg, Jeffry A. Mintz, Deborah M. Greenberg and Morris J. Baller, Attorneys for Plaintiffs-Appellees at 10 Columbus Circle, New York, New York 10019, the addresses designated by said attorneys for that purpose by depositing same enclosed in a postpaid properly addressed wrapper, in official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Gayle Corbisiero
Gayle Corbisiero

SWORN TO before me this
24th day of October, 1974.

Notary Public